

OXY USA, Inc. and Oil, Chemical and Atomic Workers International Union. Case 17-CA-17689

September 23, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

Upon a charge filed by the Union on November 2, 1994, and an amended charge filed on December 19, 1994, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on May 23, 1995, alleging that the Respondent violated Section 8(a)(1) and (5) of the Act by insisting to impasse, and as a condition to reaching any collective-bargaining agreement, that the Union agree to serve as the sponsor and administrator of the health care plan of bargaining unit employees.

On March 18, 1996, the General Counsel, the Respondent, the Charging Party, and the Party in Interest filed with the Board a stipulation of facts and motion to transfer the case to the Board. The parties stated that the charge, amended charge, complaint, answer, and the stipulation of facts constitute the entire record in this case and that they waive a hearing before an administrative law judge. On May 28, 1996, the Board approved the stipulation and transferred the proceeding to itself for issuance of a Decision and Order. The General Counsel and the Respondent filed briefs, and the Respondent filed a reply brief.

On January 8, 1997, the Board solicited the views of the U.S. Department of Labor and the Criminal Division of the U.S. Department of Justice on the issues raised in this case.¹ Both agencies submitted comments. The Charging Party filed a reply brief to the comments submitted by the U.S. Department of Justice.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, briefs, and comments, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, is engaged in the exploration and production of petroleum from various sites throughout Kansas and other locations in the United States. The Respondent annually receives gross revenues in excess of \$500,000 and performs services valued in excess of \$50,000 directly from points located outside the state of Kansas.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7)

of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Bargaining history regarding health care coverage

The Respondent (OXY) has been the sponsor and administrator of the health insurance plans covering its represented employees under past collective-bargaining agreements with the Union. Until 1992, OXY maintained a self-funded group health care plan (the Group Plan) that provided medical and dental coverage for the Respondent's Union-represented hourly employees. This plan was funded by contributions made by the Respondent and by represented employees to a tax-exempt trust (the Trust) created under Internal Revenue Service Code 501(c)(9). In 1992, the Group Plan provided medical and dental benefits for all of the Respondent's represented hourly employees in Longview, Texas, the State of Oklahoma, and the State of Kansas. The Trust approached underfunding in 1992, which situation prompted OXY and the Union to discuss various health care alternatives.

In those discussions, the Union requested that the Respondent seek bids for alternative health care coverage. Consistent with this request and its role as plan sponsor, the Respondent compiled claims data and sought quotations from a number of insurers. The Respondent ultimately selected a fully insured health care plan provided by Aetna Insurance Company in August 1992. The Respondent agreed to serve as sponsor of the Aetna health care plan, but informed the Union that it would prefer not to serve as plan sponsor in the future.

Following the adoption of the Aetna plan, a number of hourly employees, and later the Union, complained about the level and cost of health care insurance under that plan. To address the employees' complaints, the Union sought to find coverage that was more favorable than the existing Aetna coverage. To that end, the Union reviewed the Respondent's claims data and sought quotations from several other insurance carriers. The Union failed to locate a viable alternative health care provider by the time negotiations for a new collective-bargaining agreement began in January 1994.

2. The parties' 1994 contract negotiations

The most recent collective-bargaining agreement between the Respondent and the Union covering the Respondent's Kansas employees expired on January 31, 1994. Negotiations for a new contract began about January 11 and 12, 1994. During the negotiations, the parties agreed to adopt almost all of the terms and conditions contained in the expired contract, but failed to reach agreement on a few core issues, including the issue of who would serve as sponsor of the health insurance plan covering the Respondent's Kansas represented hourly

¹ Copies of the solicitation were also sent to the Internal Revenue Service and the Pension Benefit Guarantee Corporation for any additional comments they chose to submit based on their specific expertise. These agencies did not submit comments.

employees. The Union requested that the Respondent continue to serve as sponsor of the health care plan. The Respondent reiterated that it would prefer not to continue in that role given the time, expense, and administrative burden involved.

At the parties' June 10, 1994 bargaining session, the Union informed the Respondent that it had located an alternative health care plan provided by Blue Cross/Blue Shield of Kansas (Blue Cross), and suggested that the Respondent substitute that plan for the Aetna plan that was in place. The Union was unable to find an independent sponsor and administrator for the Blue Cross insurance plan, however, and proposed that the Respondent serve as the plan sponsor. The Respondent agreed to continue contributing to the employees' health care plan, but rejected the Union's proposal that the Respondent itself serve as the plan sponsor and suggested that the Union assume that role. The Union said that it would consider serving as the plan sponsor.

At the bargaining sessions between the parties held on about June 23 and 24, 1994, the Union proposed that the Respondent establish a joint trust fund with the Union to provide medical benefits to the covered employees. The Respondent informed the Union that it did not wish to create another trust fund and reiterated its position that it did not want to continue serving as the plan sponsor. The Respondent again proposed that the Union serve as the sponsor. The Union rejected the Respondent's proposal and indicated that it did not sponsor health care plans for represented employees.

During the course of bargaining, the Respondent learned that the Union had served for more than 20 years as the sole sponsor of an employer-funded health insurance plan for certain represented employees employed by one of the Respondent's competitors, the Phillips Petroleum Company in Kansas. The health care plan covering Phillips employees and sponsored by the Union was provided by Blue Cross/Blue Shield of Kansas. The Respondent also learned that the Union was serving as the health care plan sponsor for certain employees of Shell Oil Company in California represented by the Union.

On July 19, 1994, the Union informed the Respondent that it had been unable to find an independent sponsor and administrator for the Blue Cross insurance plan, and again proposed that the Respondent serve as the plan sponsor. The Respondent rejected the Union's proposal that it serve as the plan sponsor and once again suggested that the Union assume that role. The Union ultimately accepted the Respondent's proposal concerning plan sponsorship during the bargaining session held about July 19, 1994, and agreed to serve as the sponsor for the Blue Cross health insurance plan that it had located. The Blue Cross health insurance plan was to be funded by both employer and employee contributions.

3. Breakdown of negotiations

At the parties' August 8, 1994 bargaining session, the Union withdrew its offer to serve as the sponsor and administrator of the Blue Cross plan, claiming for the first time that unions are prohibited by Section 302 of the Act from serving as sponsors of health insurance plans funded by employer contributions. In support of its position, the Union provided the Respondent with a letter that it had obtained from its counsel regarding the plan sponsorship issue. During the bargaining session held the next day, August 9, 1994, the Respondent reiterated its position that it would not serve as sponsor and informed the Union that its legal counsel had reviewed the letter prepared by the Union's counsel and disagreed with the conclusions set forth in the letter.

At the parties' next bargaining session on September 7, 1994, the Union again claimed that it could not legally serve as the health care sponsor and administrator. The Union provided the Respondent with a second letter from its counsel in support of its position. The bargaining session ended with no agreement on the issue concerning health care plan provider sponsorship. Notwithstanding its position that it could not legally serve as sponsor of health care plans, the Union at no time provided the Respondent with any information suggesting that it had discontinued its practice of serving in that role for employees represented by the Respondent's competitors, Phillips Petroleum Company and Shell Oil Company.

4. Substantive terms of the Respondent's proposal

Under its proposal, the Respondent would disburse its contributions and the contributions of its represented employees directly to Blue Cross. The Respondent's proposal strictly prohibits: (1) the Union from receiving or gaining control over any of the moneys used to pay the insurance premiums for the Respondent's employees' health care coverage; and (2) the transfer of any funds to the Union. The Union would have no authority to unilaterally change the amount or type of health care coverage provided under the plan. The proposal expressly requires that the Respondent consent to any change in coverage under the plan. The Union's duties as "plan sponsor" under the Respondent's proposal would be to make all ERISA-mandated filings, to field employee complaints about health care, to compile claims data, and to present bids for alternative coverage to the Respondent as necessary.

During the relevant period, the Union had already been actively reviewing the Respondent's claims data and seeking bids from insurance carriers in an effort to find a health care plan more favorable than the Aetna plan. During their negotiations, the parties discussed the concept of the Union's becoming the plan sponsor, but did not discuss the specific duties that the Union would assume in that role.

5. The parties' declaration of impasse

On October 21, 1994, the parties agreed that they were at impasse on several issues, including plan sponsorship. About October 26, 1994, the Respondent implemented certain terms of its final offer. Specifically, the Respondent granted employees a 4-percent base pay increase effective September 1, 1994, and gave an \$800 lump-sum bonus to all hourly represented employees who were on the payroll as of September 1, 1994, and were still working in Kansas as of September 30, 1994. The Respondent also dissolved the Trust and distributed its remaining assets in single-sum payments to all employees who participated in and contributed to the Group Plan as of July 31, 1992, and who were currently employed by the Respondent or who were currently covered by the represented employee health care plan. The amount of the distribution that each employee received varied, depending on the employee's plan participation and level of coverage as of July 31, 1992. The items implemented by the Respondent were described in an October 26, 1994 letter from the Respondent to the Kansas represented hourly employees. The Respondent did not implement any change with respect to employee health care and has remained the sponsor of the existing health care plan provided by Aetna.

B. Contentions of the Parties

The General Counsel contends that, under the Respondent's final health care offer, the authority that would be conferred on the Union by virtue of the Employee Retirement Income Security Act would constitute a transfer of a "thing of value" and would contravene the language and spirit of Section 302 of the Act. The General Counsel defines that "thing of value" as the "ability to control how funds are spent and how a fund is administered," "the legal power to bargain a benefit plan with the provider," and the "legal power to involve itself in disputes as to whether the provider paid what it was expected to pay." Thus, the proposal is unlawful under Section 302, the General Counsel argues, and the Respondent insisted to impasse on an illegal bargaining subject and thereby violated Section 8(a)(5).

In support of his position that the bargaining proposal is unlawful, the General Counsel advances a "third party beneficiary" theory. He cites *Carpenters Local 626 v. Delaware Contractors Assn.*, 344 F.Supp. 1281 (D. Del. 1972), *aff'd*, per curiam 477 F.2d 564 (3d Cir. 1973), in which a Federal district court held that a contractual employee-funded vacation benefit plan was unlawful under Section 302. In that case, by virtue of the control the union exercised over disposition of the benefit plan funds, payments to the union-selected bank that managed the funds were held to be in fact payments to the Union.

The General Counsel also relies on *U.S. v. DeBrouse*, 652 F.2d 383 (4th Cir. 1981), in which the Fourth Circuit

upheld a union official's convictions for receipt of a "thing of value," in violation of Section 302(b)(1). This conclusion was based partly on the official's requests that the employer award a contract to an extermination company in which the official had a secret financial interest and that the employer hire a "ghost employee."

Finally, the General Counsel cites *U.S. v. Carlock*, 806 F.2d 535 (5th Cir. 1986), in which the Fifth Circuit upheld the racketeering conviction of a union official based in part on his demand, in violation of Section 302, that the employer lease equipment from a firm that was owned by the former daughter-in-law of the union official. The court noted that the government need not prove that the union defendant benefited from the payments to the third party.

The Respondent argues that nothing would flow from the Respondent's proposal other than an "intangible" benefit, and that Section 302 does not prohibit such benefits. The Respondent relies principally on *U.S. v. Cervone*, 907 F.2d 332 (2d Cir. 1990), *cert. denied* sub nom. *Bernesser v. U.S.*, 498 U.S. 1028 (1991), in which a union official assisted construction industry employers in paying the leader of a minority group, which had tried to secure employment for minority employees, in order to have the minority leader leave the job site. The Second Circuit found that the transaction did not violate Section 302 because "the union official's continuing ability to influence corrupt union practices" was, not a thing of value, but a benefit that "seem[ed] not only intangible but also unidentifiable." 907 F.2d at 347.

C. Comments of the U.S. Department of Justice

In its comments, the U.S. Department of Justice (DOJ) finds that the Respondent's proposal for an employee health care plan was not one for the delivery or receipt of a thing of value, in the form of a tangible or intangible benefit, to the Union or other employee representative in violation of Section 302(a) or (b).²

First, DOJ notes that, under the Respondent's proposal, the Respondent's remittances to the health care benefit fund are made directly to a third-party insurance provider whose final selection is made by the employer. The proposal also forbids those moneys to be transferred to the Union's control. In this respect, according to DOJ, precedent relied on by the General Counsel is distinguishable. Thus, unlike the employee-funded vacation plan administered by the union in *Delaware Contractors Assn.*, *supra*, the Union here is unable to unilaterally select the manager of the plan's funds or the party to which the Respondent will remit health care benefit contributions. Rather, the employer is the

² In separate comments, the U.S. Department of Labor has deferred to the Department of Justice's interpretation of Sec. 302 (a) and (b).

At the request of the Department of Justice, we note that its comments were provided as advice to the NLRB to assist the Board in its decision, and not as an advisory opinion to the public.

ultimate decision maker as to which benefit provider will be selected and to whom contributions will be remitted.

Likewise, according to DOJ, the third-party beneficiary rationale set forth in *DeBrouse* and *Carlock*, supra, is inapposite in this case. In *DeBrouse*, with respect to the intangible benefit which the union official was found to have received in the “ghost employee” transaction, the court concluded that “[h]aving shown the employer’s acquiescence in DeBrouse’s demand, the government was not required to prove that DeBrouse received the money.” 652 F.2d at 388. In effect, the court held that the potential for corruption of labor-management relations and of the official’s honest representation of employees was as apparent as if the union official himself had been paid directly. No 302(c) exception would apply if the latter transaction had occurred.

Similarly, DOJ continues, the court concluded in *Carlock* that a violation of Section 302 could be sustained without a showing that the union official received a financial benefit from the transaction. In the court’s view, by demanding that the employer execute a lease from a company owned by his relative, the union official in *Carlock* received an intangible benefit in the form of the employer’s compliance with the union’s demand in the face of the “power exacted by the official to direct payments to others.” 806 F.2d at 555.

On the other hand, DOJ points out that in *Cervone*, supra, relied on by the Respondent, the union official’s demand that the employer pay off the minority leader, a potential rival of the union official, did not differ in any material respect from the payments requested by the union officials in *DeBrouse* and *Carlock*. In each transaction, the union official benefitted from the employer’s compliance with his request, and the union official’s loyalty to employees he represented was potentially compromised by the resulting conflict of interest. Nonetheless, unlike *DeBrouse* and *Carlock*, the *Cervone* court rejected the government’s contention that the union official had received a thing of value in that transaction.

Thus, although two courts of appeals have approved the “third party beneficiary” theory advanced by the General Counsel, DOJ notes that the theory has not been universally accepted, and there are limitations to its application. At least in some circumstances, a union representative cannot be convicted of receiving an intangible benefit proscribed by Section 302 by requesting that an employer make financial or other tangible payments to a third party if those third-party payments themselves could be made lawfully. For example, had the union official in *DeBrouse* demanded that wages and benefits be paid not to a “ghost employee,” but to an employee of the employer’s choice and for services to be performed that are commensurate with those wages and benefits, no violation of Section

302 would obtain because the payments would fall within the 302(c)(1) exception for “compensation for, or by reason of . . . service as an employee”

Similarly in this case, in DOJ’s view, the Respondent’s proposal seeks to insulate the Union from Section 302 liability by depriving it of any control over the health care benefit contributions. The Union has not requested, nor has the Respondent in its proposal agreed to deliver to it or any other entity, employee benefit contributions that can be unilaterally invaded by the Union. The transfer of the tangible monetary contributions directly to a third-party insurance provider is in itself lawful; thus, any intangible benefit that the Union enjoys by virtue solely of its legal relationship to the insurance provider may likewise be deemed lawful.

At least one court has limited the application of the third party beneficiary theory to situations in which there is a request or demand by a union representative for a third-party benefit, rather than, as here, where the proposal is initiated by the employer. In *Levin-Richmond Terminal Corp. v. Local 10*, 751 F.Supp. 1373 (N.D. Cal. 1990), the court denied a summary judgment motion to strike down an employer-initiated “wage” payment proposal. In settlement of a work-assignment dispute with the union, the employer had offered to pay wages to employees, even though no services had been performed to earn those wages. The court rejected the third party beneficiary doctrine, distinguishing *DeBrouse* and *Carlock* on the ground that the union had not requested the wage payments to third-party employees, and therefore derived no intangible benefit as it would if it had demanded these payments from the employer. Implicit in the court’s holding is that Section 302 “value” is “usually set by the desire to have the ‘thing’ and depends upon the individual and the circumstances.” *U.S. v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964), cert. denied 380 U.S. 942 (1965).

Finally, DOJ notes that the General Counsel’s claim of illegality is focused not on the terms of the proposal on its face, but on the potential for improper side arrangements between the Union and the insurer if this proposal were sanctioned. DOJ cites *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581 (1993), for the proposition that Section 302 is concerned with the manner in which a benefit plan is established, rather than how it is administered after it has been established.

D. Discussion

Section 8(d) of the Act provides that an employer and an employee representative are obligated to bargain “with respect to wages, hours, and other terms and conditions of employment.” Such items, including terms of health care plans, are mandatory subjects of bargaining. However, the Act does not require parties to bargain over illegal subjects, and an employer that insists upon inclusion of such a provision as a condition of

reaching an agreement violates Section 8(a)(5) of the Act. *NLRB v. BASF Wyandotte Corp.*, 789 F.2d 849, 853 (5th Cir. 1986).

Authority to restrain violations of Section 302 is vested in the United States district courts by Section 302(d) and (e). The Board has no authority to enforce Section 302. Nevertheless, the Board has held that it would, if necessary, decide whether contract provisions violated Section 302 in deciding whether an unfair labor practice has been committed. *National Fuel Corp.*, 308 NLRB 841, 843 (1992). It is therefore appropriate here to decide the merits of the General Counsel's claim that the Respondent's proposals are unlawful under Section 302 in determining whether its insistence to impasse on its bargaining proposal violated Section 8(a)(5).³ For the reasons discussed below, we find that the Respondent's proposal that the Union sponsor and administer the employee health plan is not unlawful under Section 302.

Section 302(a) and (b) of the Act make it unlawful for the employer to "pay, lend or deliver, or offer to pay, lend, or deliver" or for a labor organization to "request, demand, receive, or accept"

any money or other thing of value—(1) to any representatives of any of his employees . . . or; (2) to any labor organization, or any officer or employee thereof.

By way of exception, Section 302(c) states that

[t]he provisions of this section shall not be applicable . . . (5) with respect to any money or other thing of value paid to a trust fund established by such representative.

Provided, That (A) such payments are held in trust for the purpose of paying . . . for the benefit of employees, their families and dependents, for medical or hospital care . . . (b) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are

equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree on.

When it enacted Section 302, Congress was "concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo v. U.S.*, 359 U.S. 419, 426 (1959) (footnotes and citations omitted).

As set forth above, DOJ has concluded that Respondent's proposal does not violate the provisions of Section 302. As a matter of comity, we shall defer to the opinion of the Department of Justice, which has the responsibility of enforcing that Section of the Act.⁴ We can discern no basis for disregarding DOJ's authoritative analysis of the substantive terms of the relevant language here.

As we have found that the Respondent's bargaining proposal is not unlawful under Section 302, we find no merit in the complaint allegation that the Respondent insisted to impasse, in violation of Section 8(a)(5), on an illegal bargaining proposal.⁵

ORDER

The complaint is dismissed.

⁴ Cf. *William Wolf Bakery, Inc.*, 122 NLRB 630, 631 (1958).

⁵ The General Counsel's complaint specifically alleges the following: "The condition described above [that the Union agree to serve as the employee health insurance plan sponsor and administrator] . . . is prohibited by Section 302 of the Act and is an unlawful subject of bargaining." As the complaint does not base the claim of illegality concerning the Respondent's bargaining proposal on Title 1 of ERISA, we do not pass, nor have the U.S. Departments of Justice or Labor in their comments passed, on the implications of ERISA to the facts presented in this case.

We note that the complaint allegations are grounded solely on the legality, and on no other aspect of, the bargaining proposal.

³ We note that in several prior cases in which the Board considered Sec. 302, the Board decided whether certain unilateral action on the part of employers in repudiating contract provisions was justified by the employer's claim that such provisions were unlawful under Sec. 302. *National Fuel*, *supra*; *BASF Wyandotte*, *supra*. Here, by contrast, it is the General Counsel who is alleging that the provision at issue is illegal under Sec. 302. Thus, it is the General Counsel's burden to establish the illegality of the Respondent's plan.